

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LINCOLN UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2012080271

ORDER GRANTING REQUEST FOR
RECONSIDERATION AND
GRANTING REQUEST FOR STAY
PUT

On August 9, 2012, Student filed a request for due process hearing and mediation and a request for stay put. District filed an opposition to the stay put request on August 14, 2012, in which it argued that it did not disagree that it was obligated to implement Student's last agreed upon IEP nor did District "believe there is any dispute regarding the IEP components to be implemented." The Office of Administrative Hearings (OAH) denied Student's request for stay put on August 15, 2012 on the ground that District agreed to implement his last agreed upon IEP for the 2012-2013 school year. On August 17, 2012, the Office of Administrative Hearings OAH granted District's notice of insufficiency and granted Student leave to amend the complaint. On September 4, 2012, and September 6, 2012, Student's advocate file a request for stay put, and on September 6, 2012, Student's advocate filed an amended request for due process hearing and mediation. District filed an NOI on September 5, 2012, and an opposition to Student's request for stay put on September 11, 2012. The NOI was granted with leave to amend, making Student's request for stay put moot.

Student filed a second amended complaint on September 21, 2012, accompanied by another request for stay put. The stay put request was not supported by any evidence, such as a copy of Student's last agreed upon individualized education program (IEP). On September 24, 2012, District filed an opposition to the stay put motion, supported by a declaration under penalty of perjury from its attorney, which also did not establish what the terms of Student's stay put should be. On October 2, 2012, the undersigned Administrative Law Judge (ALJ) issued an Order compelling the parties to submit additional evidence, including a copy of the last agreed upon IEP, establishing what the terms of stay put should be. The order required Student to file his additional evidence by October 9, 2012, and, if he did so, then District was ordered to file its response with additional evidence seven days later.

On October 9, 2012, Student's advocate timely filed a notice of representation, and a declaration reiterating circumstances relating to Student's district of residence purportedly in support of Student's request for stay put. However, Student did not comply with the October 2, 2012 Order by providing a copy of the last agreed upon IEP, or any evidence establishing what placement and services should be. Accordingly, on October 10, 2012, the undersigned

ALJ denied Student's motion for stay put on the ground that Student did not provide evidence of the last signed IEP or the terms of Student's stay put.

On October 15, 2012, Student's advocate filed another notice of representation, evidence in support of Stay Put and request for reconsideration of the October 10, 2012 Order denying stay put. Student's advocate acknowledged in a declaration under penalty of perjury that he had made a clerical error and filed an incomplete draft with OAH on October 9, 2012. The October 15, 2012 filing included a copy of Student's January 31, 2012 IEP, which was signed by Student's parent and authenticated by the advocate's declaration.

On October 17, 2012, District filed an opposition to the request for reconsideration and made no reference to the evidence filed by Student in support of Student's request for stay put. Instead, District's counsel argued only that Student's advocate's errors in filing the October 15, 2012 documents in support of stay put should not be excused and requested that the undersigned deny the motion for reconsideration. Despite having the opportunity to do so as part of its opposition to this motion and renewed request for stay put, District inexplicably did not address the merits of Student's renewed request. Instead, District requested seven additional days to file a supplemental brief supporting its opposition to stay put, without any explanation as to why it could not do so in this opposition.

For the reasons discussed below, Student's request for reconsideration is granted, and Student's request for stay put is granted.

APPLICABLE LAW

The Office of Administrative Hearings will generally reconsider a ruling upon a showing of new or different facts, circumstances, or law justifying reconsideration, when the party seeks reconsideration within a reasonable period of time. (See, e.g., Gov. Code, § 11521; Code Civ. Proc., § 1008.) The party seeking reconsideration may also be required to provide an explanation for its failure to previously provide the different facts, circumstances or law. (See *Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1199-1200.)

Until due process hearing procedures are complete, a special education student is entitled to remain in his or her current educational placement, unless the parties agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a) (2006); Ed. Code, § 56505 subd. (d).) This is referred to as "stay put." For purposes of stay put, the current educational placement is typically the placement called for in the student's individualized education program (IEP), which has been implemented prior to the dispute arising. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.)

In California, "specific educational placement" is defined as "that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs," as specified in the IEP. (Cal. Code Regs., tit. 5, § 3042.)

DISCUSSION

First, Student's request for reconsideration was timely, as it was filed within seven days of OAH's order denying the request for stay put. Student's advocate appropriately explained under penalty of perjury that he had made an error in filing an incomplete draft, and he included Student's last agreed upon IEP, authenticated by his declaration under penalty of perjury. Student has met his burden of establishing that reconsideration is justified. Student has the right during the pendency of the complaint to seek a stay put order and denying reconsideration would serve no purpose other than to cause further delays and promote further prehearing motions in this case. Therefore, the motion for reconsideration is granted.

Student's January 31, 2012 IEP identifies his district of residence as Lincoln Unified School District, his current school is identified as Lincoln High, and pages 3 and 9 of 21 refer to his placement as Lincoln High School. The IEP includes accommodations and services. Student's parent signed the IEP consenting to eligibility, placement and services on January 31, 2012. Finally, Student's advocate declares under penalty of perjury that the January 31, 2012 IEP is the last signed IEP.

The record in this case demonstrates that District has had numerous opportunities to address the merits of Student's motions for stay put since Student first filed a complaint with OAH on August 10, 2012. Over the course of the next two months, District has filed several oppositions to Student's requests for stay put, none of which articulated what Student's stay put should be from District's point of view. Instead District has inconsistently argued that: 1) it is obligated to implement Student's last IEP and has no dispute over that obligation or the terms of the IEP it must implement, and 2) that District has no obligation because Student is not a resident of the district.

The history of pleadings in this case makes clear that one of the disputed issues is Student's district of residence, although no dispute exists that Student resided in the District at the time of the January 31, 2012 IEP and when District filed its first opposition to Student's request for stay put in August 2012 conceding that it must implement Student's last agreed upon IEP. A stay put motion does not address the merits of the case. As discussed above, a stay put order is intended to preserve the status quo until the issues in the complaint can be resolved, and therefore disputes over Student's district of residence must be determined after findings are made by the hearing judge.

The undersigned made clear in her October 10, 2012 order that District's opposition was deficient in the same way as Student's motion. Student has rectified the error made by his advocate on October 9, 2012, by filing a motion for reconsideration and renewing Student's request for stay put accompanied by the requisite evidence. District was served with a copy of that evidence before it filed its opposition to this motion.

Now, despite filing a timely opposition to the instant motions, District's counsel asks for seven additional days to respond to the stay put request without explaining why counsel did not provide District's position on what the terms of Student's stay put should be in its opposition, or why Student should be subjected to further delays in obtaining a stay put

order. District's request appears to be nothing more than a delay tactic, particularly given the prehearing motions in this case since August 10, 2012. Therefore, District's request for additional time to do what it should have done from the time the first motion for stay put was filed is denied.

As discussed above, during the pendency of the due process hearing, Student's stay put is defined by his last agreed upon and implemented IEP before the dispute arose, which is the January 31, 2012 IEP. The IEP establishes that his placement is at his school of residence, Lincoln High School. The IEP provides for specialized academic instruction in English in a separate classroom five times a week for 53 minutes per session; specialized academic instruction in RSP English and world history in a separate classroom eight times a week for 120 minutes per session; regular physical education; and accommodations during district-wide assessments. Accordingly, Student's motion for stay put is granted.

ORDER

1. Student's motion for reconsideration is timely and is granted.
2. Student's request for stay put is granted. Student's stay put shall be as set forth in his January 31, 2012 IEP, and as follows:
 - a) Placement Lincoln High School, the school of residence listed in the IEP;
 - b) Specialized academic instruction in English in a separate classroom five times a week for 53 minutes per session;
 - c) Specialized academic instruction is RSP English and world history in a separate classroom eight times a week for 120 minutes per session;
 - d) Regular physical education;
 - e) Accommodations during district-wide assessments.

Dated: October 21, 2012

/s/

ADRIENNE L. KRIKORIAN
Administrative Law Judge
Office of Administrative Hearings